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Jonathan Miller
Secretary

March 15, 2010

No. 10-07

Richard D. Williams, III
E&O Program Leader
Williams Underwriting Group,
a division of Maverick Insurance LLC.
P.O. Box 1086
New Albany, IN 47151

RE: Determination of Protest: RFB 395 1000000482 (Real Estate Licensee E&O Insurance).

Dear Mr. Williams:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest to the award of RFB 395 1000000482 for Real Estate Licensee E&O Insurance (the "RFB"). In the protest you contend that the bids were not properly evaluated. For the reasons stated herein, this protest is sustained.

FACTUAL BACKGROUND

The Kentucky Real Estate Commission ("KREC") issued the RFB on December 2, 2009. The RFB sought bids for KREC licensee Errors and Omissions insurance. This procurement was conducted as a "competitive sealed bid" under 45A.080. Bids to the RFB were to be evaluated as follows:

SELECTION CRITERIA

The selection criteria, which include the assignment of points, are as follows:

Criteria 1. Policy Terms and Conditions (400 points) — Policy terms and conditions relate to policy coverages, extensions, exclusions, endorsements, coverage deviations, and coverage enhancements.

Criteria 2. Scope of Service (150 points) — This relates to describing methods of servicing policies as described in the RFB; description of additional services to be provided at no additional cost; and level of

support to be provided to the KREC.

Criteria 3. Premium (350 points)— The response must include information on premium costs and other charges or fees to be assessed;

Criteria 4. References (100 points)— The bidder shall supply the names, addresses, and telephone numbers of two business or organizations as references with a comparable insurance program as those described in the RFB.

RFB, p. 17 of 21. The RFB closed on December 31, 2009. There were two bidders: Williams Underwriting Group, a division of Maverick Insurance LLC (“WUG”) and Rice Insurance Services Company, LLC (“Rice”).

The bids were forwarded to a Review and Evaluation Committee (“Committee”). In a memorandum dated January 21, 2010 (“Evaluation Memo”), the Committee provided a narrative evaluation and scoring to the Commissioners of the KREC. No official Determination & Finding was prepared by KREC to document the evaluation process and scoring. The Evaluation Memo appears to have served that purpose. The Committee reported the following scoring:

	<u>WUG</u>	<u>Rice</u>
Criteria 1 – Policy Terms & Conditions (400 points)	375	375
Criteria 2 – Scope of Services (150 points)	75	150
Criteria 3 – Premium (350 points)	350	340
Criteria 4 – References (100 points)	50	100
TOTAL	850	965

Rice accordingly received a total score of 115 points more than WUG. The Committee recommended an award to Rice. The Commissioners accepted the recommendation and awarded a contract to Rice.

WUG served an Open Records request to KREC. WUG asserts that it first had knowledge of facts giving rise to a protest on February 2, 2010.

By letter dated February 15, 2010, WUG filed a written protest to award to Rice. On February 24, 2010, Rice filed a response to the protest. On March 3, 2010, KREC filed a response to the protest. On March 3, 2010, the Commonwealth Attorney General as counsel for KREC filed a response on behalf of KREC to the protest.

DETERMINATION

After a review of the solicitation, the solicitation responses, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. WUG was an actual bidder to the RFB so it has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. In this case, the award was posted on February 1, 2010. WUG asserts that it first had knowledge of facts giving rise to a protest on February 2, 2010. The written protest was received on February 15th. Neither Rice nor KREC contends that the protest is untimely. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

This procurement was conducted as "competitive sealed bidding" under KRS 45A.080. The hallmark of "competitive sealed bidding" is the general mechanical (that is non-discretionary) nature of the award. *Compare* KRS 45A.080 (competitive sealed bidding award to the responsible, responsive bidder whose bid offers a pre-defined "best value") *with* KRS 45A.085 (competitive negotiation award "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.") In general, procurement under Kentucky's Model Procurement Code ("KMPC") is by "competitive sealed bidding." KRS 45A.080. This process utilizes a Request for Bids or RFB. In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value."

One of the key factors distinguishing sealed bidding from negotiated acquisition is the requirement for the public opening of all bids at the time and place stated in the Request for Bids. *Compare* 200 KAR 5:306(2) *and* KRS 17.080(2) (Competitive Sealed Bidding) *with* 200 KAR 5:307 (Competitive Negotiation). The purpose of the public bid opening requirement is to protect the public and the interest of the bidders against fraud, favoritism or partiality in the letting of contracts, and to enable competing bidders to verify whether other bids are responsive. *Bartomeli Co., Inc.*, Comp Gen Dec B-246060, 92-1 CPD 170 (Comp. Gen. Feb. 10, 1992).

A competitive sealed bid is "responsive" if it conforms in all material respects to the invitation for bids. KRS 45A.070(7). Responsiveness is determined at bid opening. *Interstate Rock Products v. U.S.*, 50 Fed.Cl. 349, 360 (Fed.Cl. 2001). A non-responsive bid cannot be cured after bid opening. *Id.* A determination of responsiveness must be made with information contained in the bid document at bid opening only. *Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272, 275 (Fed.Cl. 1996); *but compare* 200 KAR 5:306(3) (purchasing officer may seek post bid-opening "clarification" of matter contained in bid) *with* *Central States Bridge Co.*, 85-2 CPD ¶ 154 (Comp.Gen. 1985) ("A bid which is nonresponsive on its face may not be changed, corrected, or explained by the bidder after bid opening.").

A bidder is “responsible” if “it has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” KRS 45A.070(6). A determination of “responsibility” is made after bid opening but before award. *Honeywell, Inc. v. U.S.*, 870 F.2d 644, 649 (Fed.Cir. 1989). Further, this determination of “responsibility” may consider extrinsic matters, that is, information obtained outside the bid document. *Precision Standard, Inc. v. U.S.*, 69 Fed. Cl. 738, 752 (2006), *judgment aff’d*, 228 Fed. Appx. 980 (Fed. Cir. 2007) (citing FAR 9.105-2(b)). A responsibility determination is a discretionary determination by the agency. *See Ryan Co. v. U.S.*, 43 Fed.Cl. 646, 651 (Fed.Cl. 1999).

A bid offers “best value” if, based upon objective and quantifiable criteria including price, it meets the specific business requirements and best interests of the Commonwealth. KRS 45A.070(3); OAG 80-311. The evaluation factors must also be stated in the solicitation document. *Id.* *See also* FAP 111-35-00(4) (“A Solicitation shall clearly identify the procurement as a best value award, shall contain the **measurable** best value criteria, and shall clearly explain how the criteria shall be used in the evaluation and award process. Best value shall be based on **objective and quantifiable criteria that shall include price**”); *Community Services Project, Inc. v. BAWAC Cleaning Services, Inc.*, 226 S.W.2d 852, 855 (Ky.App. 2007) (considering a procurement with “best value” points awarded based on objective factors such as price, months in business, and number of similarly-sized contracts).

The protester bears the burden of proof. *See Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) (“protester has burden of demonstrating the merits of its case.”); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). The burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An “alternative interpretation” of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. *See Laboratory Corp. of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examines whether the error was prejudicial to the protestor.

In its letter of protest, WUG asserts that the award to Rice was arbitrary, capricious, and contrary to law because the bids were not evaluated by objective and quantifiable criteria. WUG objects that each of the four RFB criteria was improperly evaluated. The solicitation document (the RFB) only gives clearly measurable criteria for three of the criteria: Criteria 1–Policy Terms and Conditions; Criteria 3–Premium; and Criteria 4–References. The Evaluation memo, however, does not evidence a purely objective evaluation of these 3 criteria. An analysis of each criteria is in order.

A. Criteria 1 - Policy Terms and Conditions

For Criteria 1–Policy Terms and Conditions, the RFB does state numerous specific requirements. A total of 400 points is available for this category. The Evaluation memo, however, does not explain the rationale behind why each bidder was awarded 375 points. As no evidence of objective and quantifiable scoring exists, WUG’s protest on this category has merit.

B. Criteria 2 - Scope of Services.

The RFB stated:

“Criteria 2 relates to describing methods of servicing policies as described in the Request for Bid (RFB); description of additional services to be provided at no additional cost; and level of support provided to the KREC”.

RFB, page 17 of 21. After reviewing the bids of Rice and WUG, the Committee found:

“Both companies have experience providing group errors and omissions insurance.

Rice has administered the Kentucky program for a total of eighteen years, beginning in 1989, except for three years (1994, 1998 and 2008). Williams administered the program for one year (2008). Williams stated it was responsible for the administration of the program for one year after the initial inception of the KREC program (mid-1980), through a predecessor company.

Currently, of the thirteen mandated states, Williams is the provider in two states, Wyoming (since 2008) and Nebraska (1993-2003 and 2005 to present). The insurance carrier for Williams in these two states is National Union Fire Insurance Company; however, in the Kentucky bid proposal submitted by Williams, the affiliated company is identified as Zurich American Insurance Company. This apparently is the first time that Williams has been affiliated with Zurich with regard to errors and omissions insurance. There was no documentation submitted regarding Zurich's experience in providing

errors and omissions insurance. National Union declined to bid on the Kentucky program for 2010-2011, according to documentation submitted by Williams.

Rice is the provider in eleven of the thirteen mandated states, including Kentucky (since 1989, except for three years), Colorado (since 2004), Tennessee (1991-1995 and 1997 to present), Mississippi (since 1994), Idaho (since 1993), Iowa (since 1995), Louisiana (since 2003), New Mexico (since 2004), South Dakota (since 1994), North Dakota (since 2002), and Rhode Island (since 1992). The company affiliate is CNA for all states, and one of CNA's insurance companies, Continental Casualty Company (CCC), is the underwriter for the insurance programs. Rice has been affiliated with CNA since 2003 for the Kentucky program.

Support Professionals and Qualifications:

Regarding the number of qualified servicing agents licensed in Kentucky, Williams provided one licensed individual. Rice provided licenses of fourteen individuals. Williams lists one licensed insurance agent. Williams lists eight licensed attorneys and seven licensed claims adjusters, of which three hold Kentucky licenses. The Rice proposal lists four Kentucky licensed insurance agents; eight Kentucky licensed attorneys; and, eleven licensed claims adjusters, including nine licensed attorneys and two licensed adjusters.

Claims are reported to the Zurich Claims Office, located in Schaumburg, Illinois. For Rice, claims are reported to the Rice Claims Office in Louisville, Kentucky.

Level of Support to the KREC.

Williams states that it "understands the nuances of Mandated E&O programs in general and the Kentucky program in particular" in providing the scope of services required. The company emphasizes its strong risk management and loss reduction initiatives and high level of customer support. The company states it handling and servicing of claims is efficient and provides details of its claims processing.

Williams also attends agency meetings and conduct programs and seminars for real estate commissions. While the comments of Williams are extensive regarding servicing and support, most comments are general and applicable to all states, with only a few direct references to Kentucky.

The Rice proposal provides details of its claims processing, customer service and risk reductions efforts. It outlines specific services it will provide to Kentucky at no additional cost, including a detailed and high level of support

to KREC staff. Of particular interest are the comments to assist in the coordination and meeting the new requirements regarding municipal tax billing and reporting. The Rice proposal is quite detailed in summarizing various efforts to support KREC staff, including assistance with educational programming and agency communications.

Information to be Provided Insured:

Both bidders agree (by submission of bid proposals) to provide the required information and policy mailers to licensees purchasing coverage, including a description of coverage provided, terms and conditions, optional coverages, instructions for securing additional information and for reporting claims.

Mid-Term Changes:

This provision relates to reporting of additional licensees, calculation of premium (pro rata), coverage for new licensees, re-affiliation requirements, etc. Both companies are consistent in meeting these provisions.

Claims Reports:

No difference with regard to claims compliance and the submission of quarterly loss run reports with the reporting of claims.

Legal Defense:

Finally, regarding the selection of legal counsel both proposals state that the carrier has the right to select counsel. Both proposals allow the insured to select representation from an approved list of qualified law firms and attorneys. The Williams proposal lists the names of twenty-four law firms and attorneys. Rice lists the names of thirty-eight firms and attorneys. Rice offers more legal options to Kentucky licensees in terms of the overall number of legal firms and attorneys to select from and the broader geographical distribution that the firms and attorneys represent."

Evaluation Memo, pages 5 to 7. Rice was awarded 150 points; WUG was awarded 75 points.

In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value." The analysis in the Evaluation Memo assumes that the bids are responsive and is focused on the "best value" element. "Best value" criteria must be objective and quantifiable. KRS 45A.070(3); FAP 111-35-00(4) (best value criteria shall be measurable, objective, and quantifiable). The evaluation factors must be stated in the solicitation document. KRS 45A.070(3). *See also*

FAP 111-35-00(4) (“A Solicitation shall clearly identify the procurement as a best value award, shall contain the **measurable best value criteria**, and **shall clearly explain how the criteria shall be used in the evaluation and award process**. Best value shall be based on objective and quantifiable criteria that shall include price.”) An evaluation of “best value” should be made with information contained in the bid document. *See Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272, 275 (Fed.Cl. 1996) (concerning “responsiveness” but since “sealed bids” are opened publicly, the same rational also applies to “best value” criteria).

“Best value” criteria must be measurable, objective, and quantifiable. KRS 45A.070(3); FAP 111-35-00(4). The Evaluation Memo indicates that the Committee conducted a subjective analysis and review of the bid submissions. Many, if not all, of the determinations did not offer any comparative or definitive scoring analysis or apply the responses specifically to the criteria. For example, the Evaluation Memo states: “Both proposals allow the insured to select representation from an approved list of qualified law firms and attorneys. The Williams proposal lists the names of twenty-four law firms and attorneys. Rice lists the names of thirty-eight firms and attorneys. Rice offers more legal options to Kentucky licensees in terms of the overall number of legal firms and attorneys to select from and the broader geographical distribution that the firms and attorneys represent.” Law firms vary in size, quality, and reputation. The analysis of this factor appears to award greater points based on the number of “legal options” a licensee possesses. A determination that one smaller group of law firms is inferior to another larger group of law firms may be correct, but is ultimately an inherently subjective determination. Further, the volume of “legal options” does not appear to be a objective and quantifiable piece of the criteria for “Scope of Services.” This analysis demonstrates the flaw in the reasoning and the decision reached by the KREC as it is difficult, if not impossible, to comport their decision to an objective and quantifiable review required by KRS 45A.080.

The Committee also apparently gave consideration to factors not stated in the RFB. The evaluation factors must be stated in the solicitation document. KRS 45A.070(3). For example, the Evaluation Memo states: “The Rice proposal provides details of its claims processing, customer service and risk reductions efforts. It outlines specific services it will provide to Kentucky at no additional cost, including a detailed and high level of support to KREC staff. Of particular interest are the comments to assist in the coordination and meeting the new requirements regarding municipal tax billing and reporting. The Rice proposal is quite detailed in summarizing various efforts to support KREC staff, including assistance with educational programming and agency communications.” The Committee was concerned with the importance of “municipal tax billing and reporting.” While this factor may be important, it was not stated in the evaluation criteria.

The Committee’s procedures and procurement philosophy was more in accordance with the discretion allowed in a “competitive negotiation” procurement under KRS 45A.085 than the mechanical evaluation required by a “competitive sealed bid” procurement under KRS 45A.080. There was no objective basis to award Rice 75 points more than WUG. This ground of protest has merit.

C. Criteria 3 - Premium

For Criteria 3-Premium, the Committee did not provide any type of analysis or justification for the calculation of points, although the low bidder, WUG, was awarded the maximum points (350) while Rice was awarded 10 points less (340). It is left completely up to conjecture how both parties received their point totals.

Criteria #3 stated that "[t]he response must include information on premium costs and other charges or fees to be assessed." WUG alleges that the evaluation decision appears to grant points for factors not referenced in the RFB, such as Rice's "specially designed software" for local tax rates. However, as is the problem with the entire evaluation process, it is mere speculation to determine on what basis each party tallied their points. For this reason, WUG's protest has merit. See KRS 45A.070, 45A.080 and FAP 111-35-00(4).

D. Criteria 4 - References.

The RFB evaluation Criteria 4 stated:

"The bidder shall supply the names, addresses, and telephone numbers of two business or organizations as references with a comparable insurance program as those described in the RFB."

RFB, page 17 of 21. After reviewing the bids of Rice and WUG, the Committee found:

"Both proposals complied with providing information of two references with a comparable insurance program."

Williams submitted two references:

- (1) Wyoming Real Estate Commission, and*
- (2) Nebraska Real Estate Commission.*

The Rice proposal contained ten references, including:

- (1) Colorado Department of Regulatory Agencies— Division of Real Estate;*
- (2) Tennessee Real Estate Commission;*
- (3) Mississippi Real Estate Commission;*
- (4) Idaho Real Estate Commission;*
- (5) Iowa Real Estate Commission;*
- (6) Louisiana Real Estate Commission;*
- (7) New Mexico Real Estate Commission;*
- (8) South Dakota Real Estate Commission;*

- (9) *North Dakota Real Estate Commission; and,*
- (10) *Rhode Island Department of Business Regulation.*

The Review and Evaluation Committee contacted all references submitted by both Williams and Rice. In addition, the committee contacted the Alabama Real Estate Commission for an evaluation since both companies had previously administered Alabama's errors and omissions program. The committee received the following responses:

Williams:

Nebraska (favorable)

Wyoming Real Estate Commission (favorable) Alabama (favorable)

Rice:

South Dakota Real Estate Commission (favorable) Iowa Real Estate Commission (favorable)

Idaho Real Estate Commission (favorable) Alabama (favorable)

Copies of all reference requests and returned evaluations are available for review."

Evaluation Memo, pages 9-10. After its analysis, the Committee awarded Rice 100 points and WUG 50 points.

In competitive sealed bidding, the contract will be awarded to the responsible bidder whose bid is responsive and determined to be "best value." The analysis in the Evaluation Memo assumes that the bids are responsive and is focused on the "best value" element. "Best value" criteria must be objective and quantifiable. KRS 45A.070(3); FAP 111-35-00(4) (best value criteria shall be measurable, objective, and quantifiable). An evaluation of "best value" should be made with information contained in the bid document. *See Firth Const. Co., Inc. v. U.S.*, 36 Fed.Cl. 268, 272, 275 (Fed.Cl. 1996) (concerning "responsiveness" but since "sealed bids" are opened publicly, the same rational also applies to "best value" criteria).

The RFB evaluation criteria stated: "The bidder shall supply the names, addresses, and telephone numbers of two business or organizations as references with a comparable insurance program as those described in the RFB." The Evaluation Memo found: "Both proposals complied with providing information of two references with a comparable insurance program." The Evaluation Memo noted that Rice had submitted ten references where WUG had submitted two. After bid opening, the Committee contacted the listed references. Then, after stating that each bidder had satisfied the evaluation criteria, the Committee awarded Rice 100 points and WUG 50 points. The determination to award different point amounts to Rice and to WUG was arbitrary or capricious or not consistent with the terms of the RFB. Both parties submitted two references pursuant to the instructions of the RFB. Once the KREC decided that each bidder had satisfied the criteria and the RFB did not contain any opportunities for additional points for a bidder who submitted more than two references, then there was no basis to award Rice 50 points more than WUG. This ground of protest has merit.

CONCLUSION

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

In this case, the Committee recommended an award to Rice because it was score 115 points higher than WUG. All of the awards on all of 4 criteria were not objective and quantifiable pursuant to KRS 45A.080. As such, all point totals in all four criteria were arbitrary, capricious, or contrary to law. Accordingly, WUG has demonstrated prejudice.

Accordingly, upon review of the record, WUG has demonstrated an error in the procurement and prejudice. The protest, therefore, must be **SUSTAINED**. The Kentucky Real Estate Commission is directed to rescind the award to Rice. KREC is directed to re-design and effectuate the procurement to be consistent with this Determination pursuant to either KRS 45A.080 or KRS 45A.085. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation



Robin Kinney
Executive Director
Office of Administrative Services

cc: Cindy Rice Grissom, Rice
Michael W. Wooden, KREC
Lisa K. Lang, KYAG